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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 91

THE UNITED STATES OF AMERICA,
Appellant,

vs.

PERRY HALSETH

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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BITKER & MARSHALL,
Of Counsel.

INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
The judgment of the District Court is clearly in line with all applicable prior Federal Court decisions	2
The statute is criminal and must be strictly construed	5
The judgment below is in line with the applicable Attorney General's Opinion	6
The facts as stipulated disclose no violation	6
The Postal Department, the federal agency charged with the administration of the Act involved and whose operations are affected by it, has long conceded the interpretation which gave rise to the judgment below	9
The Congress of the United States has repeatedly refused to pass a statute incorporating the precise interpretation contended for by appellant into the law here in question	12
The opinion of the District Court makes it clear that the interpretation of the statute in question contended for by the plaintiff-appellant is so patently wrong that the District Court found it unnecessary to decide many other questions raised by defendant-appellee, a decision on any or all of which might well have led to the same result	14
Motion to dismiss or affirm	15

Table of Cases Cited

Bank of Italy v. *Bentley*, 20 Pac. (2d) 940	11
France v. *U. S.*, 164 U. S. 676	3, 5
Francis v. *U. S.*, 188 U. S. 375	3
Horner v. *U. S.*, 147 U. S. 449	8
McBoyle v. *U. S.*, 283 U. S. 25	6

Page

Monarch Sales Co., Huron Sales Co., et al., In re (Before the Solicitor, Post Office Department, F. & L. Dockets 15/371 and 15/374 10
Post Publishing Co. v. *Murray*, 239 Fed. 773, 241 U. S. 675 5
Stockton v. *U. S.*, 205 Fed. 462 4
United States v. *Farrar*, 281 U. S. 624 11
United States v. *Irvine*, 156 Fed. 376 2
United States v. *Thind*, 261 U. S. 204 6
Western Union Telegraph Co. v. *Schriver*, 141 Fed. 538 11
Zucht v. *King*, 260 U. S. 174 2

STATUTES CITED

Act of March 2, 1895, Chapter 191, 28 Stat. 963 3
Act of March 4, 1909, C. 321, 213, 35 Stat. 1129 13
Criminal Code, Section 213 (now 18 U.S.C. 1302) 3
Opinions Attorney General of the United States, Volume 22, p. 198 10
Opinions of the Solicitor of the Post Office Department, Volume VII, p. 656 6

United States Code, Title 18:
Section 336 ..... 3, 9
Section 338 4
Section 387 3

United States Code, Title 39:
Section 259 9
Section 732 9

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 211 CRIMINAL T

UNITED STATES OF AMERICA

vs.

PERRY HALSETH

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 12, paragraph 2 of the Rules of the Supreme Court of the United States, the appellant, the United States, on May 2, 1951 filed a notice of appeal to the Supreme Court of the United States from the order of the District Court dismissing the indictment herein, and on May 3, 1951 served the appellee, Perry Halseth, with a copy of the appellant's statement as to jurisdiction of the Supreme Court in the above entitled cause.

The appellee hereby asserts that the appellant has stated no substantial matters or grounds making for the jurisdiction of this court. Its appeal serves only as a profitless inroad upon the time of the court. The unsubstantial character of the questions raised by the appellant is so apparent on the face of the record that the court is warranted in

summarily disposing of the appeal at this stage of the proceedings under Rule 12, paragraph 3.

Zucht v. *King*, 260 U. S. 174.

Included herein is appellee's motion to dismiss the appeal, or to affirm the judgment of the District Court on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The unsubstantial character of the appeal is evident because:

I

The Judgment of the District Court Is Clearly in Line With All Applicable Prior Federal Court Decisions

The government in its jurisdictional statement has raised a general question which is not in issue here. Appellant's statement completely fails to recognize that the principal and sole issue here involved is one of substantive law; namely, whether the statute (Section 213 of the Criminal Code; now 18 U.S.C. 1302) embraces the mailing of material which in the hands of the recipient might be used for the purpose of setting up and operating a lottery or similar scheme.

The appellee, Perry Halseth, asserts and the District Court correctly held that no offense is committed unless a lottery has been set up and put in operation by the person charged either at the time of mailing or at the time of receipt of the mail matter. The judgment of the District Court is in line with all applicable prior federal court decisions.

An indictment under this section must aver, either specifically or by necessary intendment, the existence of a lottery or gift enterprise, since the existence must be proven to establish the offense.

United States v. *Irvine*, 156 Fed. 376.

The Supreme Court of the United States has held that a slip of paper retained by the agent of a lottery which is the duplicate of a slip retained by the purchaser indicating the numbers selected by him, is not a paper, certificate or interest purporting to be or to represent chances, shares and interest in the prizes thereafter to be awarded by lot in the drawing of a lottery. Consequently, the interstate transportation of such duplicate slips is not a violation of Section 387, Title 18, U.S.C. (now Section 1301), since at the time of such transportation in interstate commerce no lottery was in *existence* and would not be unless and until the slips were received at the lottery office with the player's money.

Francis v. *United States,* 188 U.S. 375.

The interstate lottery transportation statute involved in the Francis case is a companion statute to the one in the instant case, as then amended in 1895, both being sections of the so-called anti-lottery legislation constituting the Act of March 2, 1895, Chapter 191, 28 Stat. 963.

In an earlier case the Supreme Court of the United States in *France* v. *United States,* 164 U.S. 676, held that there was no violation of the Interstate Lottery Transportation Statute because "hit slips" and official result sheets carried by messengers of a lottery from one state to another with the "pay-off" money were not then dependent upon the event of any lottery; they merely related to the results of a lottery already drawn and completed.

Only one case under the instant statute directly involving use of the mails in sending of punch boards as advertising material, so far as counsel has been able to ascertain, has reached the Federal courts. In 1938 an indictment was returned under Section 336, Title 18 U.S.C. in the District Court of the United States for the Southern Division of

the Northern District of Alabama wherein R. C. Bundy and William H. Gordon were charged by the Grand Jury with mailing material almost identical with the material involved in this case in violation of the instant statute. On October 4, 1938, the Honorable T. A. Murphree, District Judge, in *United States* v. *Bundy and Gordon*, No. 10098, by order entered that day, sustained the defendants' demurrer to the indictment. The Government did not appeal.

The Bundy case is not reported in the Federal Supplement, but counsel is prepared to furnish the Court with a certified copy of the record consisting of the indictment, demurrer and order dismissing the indictment, if requested.

It has been held with respect to the companion postal fraud statute, Section 338, Title 18 U.S.C., now Section 1341, that a scheme involving the sale by defendant of loaded dice, marked playing cards, etc., designed and intended to defraud persons induced to play with the buyers thereof, in which the mails were used for conveying a printed catalog of such articles, was not within the section which makes it an offense to use the mails in the conduct of a scheme to defraud, since the *scheme* to defraud third persons, if any, would be devised and perpetrated by the buyers of the apparatus when they used same, in which defendant had no part.

Stockton v. *United States*, 205 Fed. 462 (C.A. 7)

In this case the Court said in part (p. 464):

> "We start, as we must, with the concession that, although marked cards and loaded dice may be used, as stated, they are nonetheless lawful subjects of commerce. They may be manufactured, sold, and purchased. If, therefore, upon purchase and sale, the parties thereto understand precisely the subject-matter and the seller proposes to and does give to the purchaser just what the latter wants—even though it be gambling apparatus—the transaction is an ordinary contract. The

> seller has neither *devised* nor executed a *scheme* or *artifice*. But the government, to sustain the indictment and conviction in the present case, seeks to impute or ascribe to the plaintiff in error the fraudulent intent of the purchaser or possessor of the gambling devices, and thereby charge a fraudulent scheme."

By analogy, the instant case is within the four corners of Judge Geiger's opinion in the Stockton case, since there is a definite hiatus between the defendant and any persons who might punch out the card and pay their money to the operator thereof in the hope of winning a prize offered *by the operator*. It is clear that the defendant here is offering no prizes of any sort for a consideration to anyone based upon lot or chance, but is simply offering to sell certain articles of merchandise.

II

The Statute Is Criminal and Must Be Strictly Construed

The Section under which the government seeks to convict the defendant is criminal and must be strictly construed.

Post Publishing Co. v. *Murray*, 230 Fed. 773 (C.A. 1) (cert. denied 241 U.S. 675);
France v. *United States*, 164 U.S. 676 and 682.

The language of the statute now in question, under the rule of strict construction, cannot be stretched to encompass ideas or thoughts respecting the future possibility of setting up a lottery or a scheme for the distribution of prizes by lot or chance. As the Supreme Court said in the *France* case: (p. 683)

> "If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

It is well settled that when a rule of conduct is laid down in words that evoke in the common mind a fixed picture, the statute should not be extended simply because it may seem, to a prosecutor or a court, that another policy might apply, or upon the speculation that if the legislator had thought of it at the time of enactment, broader words would have been used.

McBoyle v. *United States*, 283 U.S. 25, (citing *United States* v. *Thind*, 261 U.S. 204, 209).

III

The Judgment Below Is in Line With the Applicable Attorney General's Opinion

The Attorney General of the United States has ruled with respect to the instant statute, that a company which sends out paraphernalia and information as to how a drawing may be conducted in the future *by the recipient* of the device is not engaged in conducting a lottery and is not offering prizes dependent upon lot or chance.

This opinion was based upon the mailing of catalogs offering gambling devices for sale. In the instant case this opinion is even more persuasive in that defendant does not even offer a punch card for sale through the mails.

22 Opinions Attorney General of the United States 198.

IV

The Facts as Stipulated Disclose No Violation

The exhibits which are a part of the record on this appeal and which disclose the complete mailing involved in the instant case, conclusively show that the advertising material upon which the charge is based is not material which

relates to or concerns "a lottery or similar scheme" for the distribution of prizes by lot or chance within the meaning of the statute. The material constitutes a solicitation of orders for certain items of merchandise, at a fixed and specified price. It is a mail order business. The so-called "punch cards" (Exhibits R-2 and C-2) are pieces of cardboard, containing certain descriptive matter which have no relation whatsoever to any lottery or prize scheme existing either at the time of mailing by the defendant or at the time of receipt by the persons named in the indictment.

Neither the indictment nor the exhibits disclose that any lottery or prize scheme was in operation or existence at the time of the mailing, or at the time of receipt. It is likewise obvious that such an enterprise may never be inaugurated, set up or put in operation by anyone through the use of such a card. If such card should be set up in the future, and be used to conduct a lottery or similar scheme for the distribution of a prize by lot or chance (assuming, but not conceding, that the operation of a punch board answers that description), such operation would be outside of the United States mails, in a local jurisdiction, conducted by parties other than the defendant, the defendant taking no part in and having no connection with such operation.

The sole responsibility for setting up and operating a lottery, if any, lies with the person who puts the card to such use. This can only be done by his inviting another person to punch out a name, accepting in return the amount called for on the slip punched out. In no instance did the defendant invite the addressee to punch out a name and remit the price called for by the punch. Neither the defendant nor Perry Sales Company ever offered any prize to anyone for punching out the cards. The addressee was an independent

actor under no obligation to buy defendant's merchandise for use as a prize or otherwise.

The most that can be said is that a punch card mailed by defendant is a device or a piece of paraphernalia which, like a deck of playing cards, or a pair of dice, can be used in determining the winner of a prize by lot or chance for a consideration. Also like a deck of cards, it can be used as the instrumentality in determining the winner of a prize in a game where no consideration (and therefor no lottery) is present.

If construed to cover defendant's acts then the mailing of a letter to a manufacturer or printer of punch cards or playing cards or any other type of device which could be used to determine the winner of a prize by lot or chance, requesting prices or ordering such paraphernalia, would constitute a violation of the statute, even though no actual drawing or lottery or game of chance ever resulted. The overwhelming weight of authority supports the proposition (and there is no authority known by counsel to the contrary) that there can be no scheme for the distribution of prizes by lot or chance unless and until the idea is put in motion by the setting up of an offer of a prize based upon payment and acceptance of a consideration, with the winner of the prize to be determined by lot or chance. To constitute a lottery the three elements (1) prize, (2) consideration, and (3) chance, must *all* be present.

Horner v. *United States*, 147 U.S. 449.

Thus, the mailing of material which at some future time might be or possibly could be used to operate a lottery or a game of chance is not proscribed by the statute. The basic reason for this is that the material itself does not constitute a lottery since no lottery is set up and in existence at the time of mailing.

V

The Postal Department, The Federal Agency Charged With the Administration of the Act Involved and Whose Operations Are Affected by It, Has Long Conceded the Interpretation Which Gave Rise to the Judgment Below.

Plans of businesses like the one herein involved have been in operation through the mails for more than 30 years and within the knowledge and without objection of the Post Office Department under the postal lottery statutes including the one under which the instant indictment is brought. Administratively the Post Office Department has jurisdiction over lotteries in the mails under Sections 259 and 732 of Title 39, U.S.C., which statutes are in *pari materia* with the criminal statute here involved. Likewise the instant statute under its previous form (Section 336) declared, inter alia, that material concerning lotteries or gift enterprises or similar schemes offering prizes dependent in whole or in part upon lot or chance shall not be deposited or carried in the mails or delivered by any postmaster or letter carrier. Therefore administratively the Post Office Department had the right and, if the mailing was illegal, it had the duty to refuse to accept any such material when offered for mailing.

The advertising material here involved was accepted for mailing by the Post Office at Chicago, Illinois, under third class mailing privilege (which gives the Postmaster the right to open and inspect) and was so carried through the mails, and delivered. Likewise under these companion statutes (39 U.S.C. 259 and 732) the Postmaster General, upon satisfactory evidence, has the power and authority to issue so-called "fraud orders" preventing the delivery of mail addressed to the operator of a lottery, and the pay-

ment of postal money orders, in cases where a lottery or similar scheme is being conducted through the mails. In 1947, a series of complaints was issued by the Post Office Department against mail-order houses using advertising material almost identical with that here involved, charging violation of such statutes (including the one here involved). After extensive hearings before the Solicitor of the Department, these cases were dismissed by that official.

> In re Monarch Sales Co., Huron Sales Co., et al. Before the Solicitor Post Office Department, F & L Dockets 15/371 and 15/374.

In the course of administration by the Post Office Department of the postal laws relating to lotteries in the mails, the Solicitor of that Department in 1928 stated in an opinion appearing in Volume VII, Opinions of the Solicitor of the Post Office Department, at page 656, as follows:

> "This office has ruled that it does not regard punch boards as unmailable under the postal lottery statutes when offered for mailing by manufacturers if they are not connected with the use made of the boards by the retailer. When, however, the boards are *set up* to conduct lotteries, all matter relating to the scheme is unmailable no matter by whom offered."

In other words, mailing such as involved in this case are not unmailable under the postal lottery statutes since they are not connected with the use made of the boards by the recipient. They are not presently *set up* to conduct a lottery and may never be so set up.

In the case of *United States* v. *Bundy, et al.*, referred to earlier, the issues and the statute are identical with the issues and the statute in the instant proceeding. The indictment in the *Bundy* case discloses that the same type of circular letter and the same type of punch card as

here involved, were mailed by the defendants. It is noteworthy that the Court's action in granting the motion to dismiss the indictment, being a final order, was appealable by the government. No appeal was taken. It is also significant that the government has made no other known attempt to interpret the law as it seeks in the instant case. It is even more persuasive that no reported decision supports any such position. The absence of reported decisions sustaining an alleged liability under a given set of facts raises a strong presumption that no such liability exists.

Western Union Telegraph Company v. *Schriver*, 141 Fed. 538 (C.A. 8); *Bank of Italy* v. *Bentley*, 20 Pac. (2d) 940.

By analogy, dicta in *United States* v. *Farrar*, 281 U.S. 624, might be said to apply with equal force to the instant case. The *Farrar* case involved construction of the prohibition act which made it a criminal offense to "purchase . . . any liquor without first obtaining a permit from the commissioner so to do . . .". The United States Supreme Court said: ". . . that during the entire life of the National Prohibition Act, a period of ten years, the executive departments charged with the administration and enforcement of the act have uniformly construed it as not including the purchaser in a case like the present. No prosecution until the present one has ever been undertaken upon a different theory and Congress, of course, well aware of the construction and practice, has significantly left the law in its original form."

These rulings, opinions and decisions of administrative officers of the government are overwhelmingly persuasive in the instant case, particularly when it is borne in mind that the instant statute must be strictly construed and is not open to the great liberality of interpretation which the government now contends for.

VI

The Congress of the United States Has Repeatedly Refused to Pass a Statute Incorporating the Precise Interpretation Contended for by Appellant Into the Law Here in Question.

The history of the statute in question, and the past enforcement thereof, inevitably leads to the conclusion that the statute does not and was never intended to proscribe the sending by mail of devices or paraphernalia which, at some future time in the hands of the recipient, might be used by him for the conduct of a lottery or scheme for the distribution of prizes by lot or chance. The statute was last amended in 1895, the amended statute becoming a part of the anti-lottery legislation under the Act of March 2, 1895. This included three sections relating to Federal regulation of lottery traffic, one involving use of the mails (the present statute), the second involving importations from abroad, and the third involving interstate carriage of lottery material (construed in the *Francis* and the *France* cases (*supra*)).

As early as 1915 the Government, through the Post Office Department, reported to Congress that the instant statute did not embrace the plan of operation charged in this indictment. Beginning that year, and possibly earlier, bills were introduced in Congress to amend the instant statute so as to make the operations charged in the indictment, unlawful thereunder. These bills were reintroduced year after year until 1932. Each time these bills were submitted to Congress, the Post Office Department recommended passage and at times suggested changes that might strengthen them. But none were ever enacted into law; there has been no amendment to the statute since 1895. (By the Act of

March 4, 1909, C. 321, 213, 35 Stat. 1129, the statute was incorporated without change in the 1910 U. S. Criminal Code, as Section 213).

The hearings before the subcommittees of the Committee on the Post Office and Post Roads of the House of Representatives and before the Committee on Post Offices and Post Roads of the United States Senate with respect to this proposed amended legislation as exemplified by the printed reports clearly established that the Government lacked jurisdiction under then existing law over mailings such as in the instant case. A portion of the record of one such hearing has been set forth in the opinion of the District Court (pp. 22 & 23 of appellant's statement).

The statute had always contained the language "letter, package, postal card or circular concerning", but it was the position of the Government that to secure control over mailings such as in the instant case, it would be necessary for the Congress to amend the instant section by making it an offense to deposit in the mails any "article, device or thing designed or intended for the conduct of such lottery enterprise or scheme or matter relating thereto." The annual reports of the Postmaster General for a number of years subsequent to 1915 include a reference to the fact that such an amendment had been recommended to Congress by the Post Office Department. After 1932 apparently such efforts were discontinued.

VII

The Opinion of the District Court Makes It Clear That the Interpretation of the Statute in Question Contended for by the Plaintiff-Appellant Is So Patently Wrong That the District Court Found It Unnecessary to Decide Many Other Questions Raised by the Defendant-Appellee, a Decision On Any or All of Which Might Well Have Led to the Same Result.

As pointed out in the opinion of the District Court (page 15 of appellant's statement), the appellee raised many serious constitutional questions as to the sufficiency and definiteness of the indictment when the matter was originally heard. A decision on any or all of these might well have led to the same result in the District Court. But it seemed so certain to the District Court that the statute did not proscribe the acts in question, that it deemed it unnecessary to decide these other important questions.

The question here has been considered by the courts, the Attorney General, the administrative agencies of the government and by the legislature ever since the statute was enacted and all support the defendant's contention that the plan of business here involved is not an offense as charged.

Motion to Dismiss or Affirm

WHEREFORE this appellee respectfully submits this statement showing that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument; and this appellee respectfully moves the court to dismiss this appeal, or in the alternative, to affirm the judgment entered below.

Dated May 18, 1951.

Respectfully submitted,

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